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Supreme Court, U.S.
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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CHAUFFEURS, TEAMSTERS, and HELPERS, LOCAL 776, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Third Circuit err in failing to find a violation of the First Amendment when the National Labor Relations Board determined that Chauffeurs, Teamsters and Helpers Local 776 had an "illegal objective" in continuing to prosecute litigation in the federal court system to enforce a favorable arbitration award that Rite Aid Corporation subsequently attempted to circumvent the effect of by the filing of a unit clarification petition?

2. Was the United States Court of Appeals for the Third Circuit's determination that Chauffeurs, Teamsters and Helpers Local 776 committed unfair labor practices inconsistent with previous decisions of this Court, other United States Courts of Appeals, as well as the National Labor Relations Act?

3. Do the National Labor Relations Board's remedial powers include the ability to award counsel fees for the continued prosecution of litigation in the federal court system of a favorable arbitration award when (a) there was neither a request made for attorney's fees during that federal court litigation nor did any of the federal courts involved make such an award and (b) the National Labor Relations Board's counsel fees award is post-dated to a time period prior to any final order by the Board regarding whether any unfair labor practices took place as well as prior to a final order by the Board on the unit clarification petition?

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Third Circuit were Chauffeurs, Teamsters and Helpers Local 776, the Petitioner here, the National Labor Relations Board and, an intervenor, Rite Aid Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	2
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
I. THE THIRD CIRCUIT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	5
A. THE THIRD CIRCUIT MISINTERPRETED DICTA OF THIS COURT IN DETERMINING THAT LOCAL 776 COMMITTED UNFAIR LABOR PRACTICES	5
B. THE THIRD CIRCUIT'S DECISION REGARDING THE BOARD'S REMEDIAL POWERS IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT, PRIOR DECISIONS OF OTHER COURTS OF APPEALS, AND PRIOR DECISIONS OF THE BOARD	7
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Amalgamated Clothing Workers of Am. v. NLRB, 491 F.2d 595 (5th Cir. 1974) 8

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) 5,6,7

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 5

Chauffeurs, Teamsters and Helpers Local 776 v. National Labor Relations Bd., 973 F.2d 230 (1992) 2

Chauffeurs, Teamsters and Helpers Local 776 v. Rite Aid Corp., 305 NLRB No. 114 (1991) 2

Clyde Taylor Co., 127 NLRB 103 (1960) 5

Peddie Buildings, 203 NLRB 265 (1973), enf. denied on other grounds, 498 F.2d 43 (3d Cir. 1974) 5

Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1940). 8

Republic Steel v. NLRB, 311 U.S. 7 (1940) 7

Teamsters Local 705, 210 NLRB 210 (1974) 8

STATUTES

28 U.S.C. §1254(1) 2

29 U.S.C. §158(b) 2,4

29 U.S.C. §160(j) 6

29 U.S.C. §185 4

CONSTITUTIONAL PROVISIONS

U. S. Const. amend. I 3

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Chauffeurs, Teamsters and Helpers Local 776 [hereinafter "Local 776"], respectfully requests that this Honorable Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit [hereinafter "Third Circuit"] entered in this case on August 26, 1992.

OPINIONS BELOW

The opinion of the Third Circuit is reported at *Chauffeurs, Teamsters and Helpers Local 776 v. National Labor Relations Bd.*, 973 F.2d 230 (1992), and is reproduced in the Appendix at A-1 to A-13. The decision of the National Labor Relations Board is reported at *Chauffeurs, Teamsters and Helpers Local 776 v. Rite Aid Corp.*, 305 NLRB No. 114 (1991), and is reproduced in the Appendix at A-14 to A-28.

STATEMENT OF JURISDICTION

The decision of the Third Circuit was filed on August 26, 1992. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 8(b) of the National Labor Relations Act, 29 U.S.C. §158(b):

(b) It shall be an unfair labor practice for a labor organization or its agents —

> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

U.S. Const. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The facts surrounding this matter are essentially uncontroverted. The employer, Rite Aid Corporation [hereinafter "Rite Aid"], has been operating a centralized warehouse, called a Central Distribution Center or CDC, for over a quarter century in Shiremanstown, Pennsylvania. App. at A-3; A-16[1]. Local 776 has represented the employees at the Central Distribution Center during its operation. *Id.* Local 776 and Rite Aid are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. *Id.*

In August, 1987, Rite Aid opened a new facility in Shiremanstown, Pennsylvania which was called a Central Returns Warehouse or CRW. App. at A-3; A-16 to A-17. This new facility was staffed by non-union employees. *Id.* Local 776 filed three (3) grievances against Rite Aid alleging that the work being performed at the new facility was bargaining unit work. App. at A-4; A-17. Local 776 prevailed when an arbitrator determined on July 14, 1988 that Rite Aid had violated the parties' collective bargaining agreement and awarded both Local 776 as well as the CRW employees certain back payments and benefits. *Id.*

Rite Aid responded by circumventing the arbitrator's ruling by filing a unit clarification petition with the National Labor Relations Board [hereinafter "Board"] on August 18, 1988. *Id.*

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1. The abbreviation "App." will be used to refer to the Appendix that accompanies this Petition for a Writ of Certiorari.

On January 5, 1989, Local 776 then initiated a civil action in the United States District Court for the Middle District of Pennsylvania pursuant to Section 301 of the National Labor Relations Act [hereinafter "Act"], 29 U.S.C. §185, seeking to enforce the arbitration award. App. at A-4; A-17. Thereafter, the District Court refused to enforce the arbitration award on September 29, 1989 which decision the Third Circuit affirmed on or about April 2, 1990. App. at A-4 to A-5; A-18. This Court denied a Petition for Writ of Certiorari on October 9, 1990. *Id.*

A Regional Director of the Board issued a decision and order regarding Rite Aid's unit clarification petition on February 7, 1989 indicating that the Central Distribution Center and Central Returns Warehouse were different facilities thereby excluding the CRW employees from coverage under the collective bargaining agreement between Local 776 and Rite Aid. App. at A-4; A-17. However, the unit clarification petition was not finalized until June 9, 1989 when Local 776's request for leave to file an appeal was denied by the Board. App. at A-5; A-17.

Subsequently, Rite Aid filed a charge with the Board on or about May 15, 1989 that led directly to this Petition for Writ of Certiorari. Specifically, the charge alleged that Local 776 was engaging in unfair labor practices in violation of Section 8(b) of the Act, 29 U.S.C. §158(b), by seeking to enforce the arbitration award in federal court. App. at A-5; A-18. The Board ultimately issued a decision and order on December 11, 1991 which held that unfair labor practices had occurred. App. at A-5 to A-7; A-14 to A-28. The Board ordered, *inter alia*, that Local 776 should remit counsel fees to Rite Aid from the date of the Regional Director's decision and order of February 7, 1989 until the conclusion of the federal court litigation seeking to enforce the arbitration award. *Id.* The Third Circuit enforced the Board's decision and order on August 26, 1992. App. at A-1 to A-13.

ARGUMENT

I. THE THIRD CIRCUIT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. THE THIRD CIRCUIT MISINTERPRETED DICTA OF THIS COURT IN DETERMINING THAT LOCAL 776 COMMITTED UNFAIR LABOR PRACTICES.

In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), this Court recognized that there "are weighty countervailing considerations, however, that militate against allowing the Board to condemn the filing of a suit as an unfair labor practice . . . ." *Id.* at 741. Specifically, this Court has recognized a First Amendment right to seek access to the judicial process:

> [We have] recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances . . . . We should be sensitive to these First Amendment values in construing the NLRA in the present context. As the Board itself has recognized: '[G]oing to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer. The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right.' *Peddie Buildings*, 203 N.L.R.B. 265, 272 (1973), enf. denied on other grounds, 498 F.2d 43 (CA3 1974). See also *Clyde Taylor Co.*, 127 N.L.R.B. at 109.

Id. (citing *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)).

In the present case before this Court, the Third Circuit agreed with the Board that Local 776's federal litigation to enforce the arbitration award was being pursued for an alleged "illegal objective" — an apparently "large exception" to the constitutionally protected right to seek redress in the courts. App. at A-11 to A-13. The Third

Circuit found support for this "large exception" to a constitutionally protected right in a footnote in this Court's *Bill Johnson's* decision. *Id. Bill Johnson's*, 461 U.S. at 737 n. 5 ("We are not dealing with . . . a suit that has an *objective that is illegal* under federal law. Petitioner conceded that the Board may *enjoin* these latter type of suits.") (emphasis added).

Footnote 5 in *Bill Johnson's* simply is not applicable to the present case. Initially, at no time did the Board, or Rite Aid for that matter, attempt to seek injunctive relief to halt the federal litigation seeking to enforce the arbitration award. *See, e.g.*, Section 10(j) of the Act, 29 U.S.C. §160(j) (which codifies the Board's power to seek injunctive relief). Moreover, Local 776 could not have possibly had "an objective that was illegal under federal law" as of the date of the Regional Director's February 7, 1989 decision and order. First, the administrative proceedings before the Board on the unit clarification issue were not finalized until June 9, 1989 — over four (4) months after the Regional Director's decision and order. App. at A-5; A-17. More significantly, however, the Board did not order Local 776 to cease and desist from pursuing enforcement of the arbitration award in federal court until December 11, 1991 — or over fourteen (14) months after the federal litigation seeking enforcement of the arbitration had concluded. App. at A-5 to A-7; A-14 to A-28.

Indeed, even though the Third Circuit felt bound to defer to the Board, it indicated that based on the record before it:

> We realize that even though after February 7, 1989, the union should have recognized that it could not hope to have the arbitration award enforced, the finding that it committed unfair labor practices appears somewhat strained. To start with, it seems that Rite Aid never objected to the arbitration proceeding, at least in the sense of seeking an injunction against the arbitration. There is thus no reason to believe that the arbitration was initiated in bad faith and, of course, the Board did not hold it was. In addition, the Board did not hold that the mere filing of the district court action was an unfair labor practice. Furthermore, while it is true that the union, in prosecuting its district court ac-

> tion after the regional director's decision and order, sought to apply its collective bargaining agreement to employees already determined to be outside the distribution center unit, it could have only achieved this goal with court approval.
>
> We also observe that it is difficult to understand how the mere prosecution of the district court action can be said to have coerced the employees, since they were not parties to the action and, indeed, might not even have been aware of it. Furthermore, it could be argued that prosecution of the action to enforce the arbitration award could not have been an attempt to cause Rite Aid to discriminate against the warehouse employees, since the action could not have caused Rite Aid to do anything unless the union was successful in it, in which event the union would have been vindicated.

App. at A-8 to A-9 (footnote omitted).

Based upon the Third Circuit's view that the Board's finding of unfair labor practices is "strained" and the Third Circuit's reliance on a footnote in this Court's decision in *Bill Johnson's* in ultimately enforcing the Board's December 11, 1991 decision and order, the Petitioner respectfully requests that this Court grant a Writ of Certiorari so that this Court can clarify this important question of federal law.

B. THE THIRD CIRCUIT'S DECISION REGARDING THE BOARD'S REMEDIAL POWERS IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT, PRIOR DECISIONS OF OTHER COURTS OF APPEALS, AND PRIOR DECISIONS OF THE BOARD.

The Third Circuit simply fails to address the issue of whether the Board's remedial order, which included an award of counsel fees, was an abuse of discretion. App. at A-13, n. 5. Prior decisions of this Court, other Courts of Appeals, and the Board indicate that an abuse of discretion occurred here.

It has been well-settled by this Court that the Act is remedial in nature. *See, e.g., Republic Steel v. NLRB*, 311 U.S. 7, 10 (1940)

("The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes."); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1940).

Other Courts of Appeals have held that an award of litigation costs should only be awarded when the party who has engaged in unfair labor practices has acted frivolously. *See generally, Amalgamated Clothing Workers of Am. v. NLRB*, 491 F.2d 595, 597 n.1 (5th Cir. 1974) ("make whole" remedy is a drastic remedial device appropriate only in instances of frivolous activity).

Indeed, prior to the present case, the Board has itself held that the imposition of counsel fees against a union is not generally appropriate under the Act. *See, e.g., Teamsters Local 705*, 210 NLRB 210 (1974) (Board declined to require a respondent union to pay for the costs of litigation unless its defenses are frivolous).

It was error for the Third Circuit, as well as inconsistent with other federal decisional law, to fail to even discuss the remedial aspect of the Board's December 11, 1991 decision and order since the Third Circuit itself admitted that the initiation of the arbitration proceeding was not done in bad faith and the subsequent initiation of federal litigation to enforce the arbitration award was not an unfair labor practice. Nevertheless, the Third Circuit enforced an award of counsel fees for litigation that was concluded fourteen (14) months before a finding of unfair labor practices without discussion. Therefore, this Court needs to review the Third Circuit's decision which is so far departed from previous federal decisional law in this area.

CONCLUSION

For all the foregoing reasons, Local 776 respectfully requests that this Honorable Court grant its Petition for Writ of Certiorari.

Respectfully Submitted,

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APPENDIX

Filed August 26, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-3000 and 92-3068

CHAUFFEURS, TEAMSTERS and HELPERS
LOCAL 776 affiliated with
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO,
Petitioner No. 92-3000

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

RITE AID CORPORATION,
Intervenor

NATIONAL LABOR RELATIONS BOARD
Petitioner No. 92-3068

v.

CHAUFFEURS, TEAMSTERS and HELPERS
LOCAL 776 affiliated with
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO
Respondent

On petition for review and cross-application for enforcement of a decision and order of the National Labor Relations Board
(Board Case No. 5-CB-6292)

Submitted under Third Circuit Rule 12(6)
August 3, 1992

BEFORE: GREENBERG, ALITO, and ALDISERT,
Circuit Judges

(Filed: August 26, 1992)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

I.

BACKGROUND

This case is before the court on a petition for review and a cross-application for enforcement of a decision and order of the National Labor Relations Board reported at 305 NLRB No. 114 (1991). We will deny the petition for review and will enforce the order.

The case arises from a representational dispute. The employer, Rite Aid Corporation, operates a large chain of retail drug stores. It has several central distribution centers, including one in Shiremanstown, Pennsylvania, to service its stores. The Shiremanstown center has been responsible in a portion of Rite Aid's business area for the shipping, sorting and storing of unsold goods and for the processing of returned goods. Historically, the petitioner, Chauffeurs, Teamsters and Helpers Local 776, affiliated with the International Brotherhood of Teamsters, AFL-CIO, has represented the employees at the Shiremanstown distribution center. The collective bargaining agreement between the union and Rite Aid provides for final and binding arbitration of grievances.

In August 1987, as a result of increasing business, Rite Aid opened a Central Returns Warehouse in Shiremanstown to process returned goods, a function previously allocated to the distribution centers. Rite Aid hired 27 nonunion employees for this warehouse

and reassigned distribution center employees who previously handled returned goods to other distribution center duties. These changes led the union to file grievances on the ground that it should represent the warehouse employees. The union was successful, for on July 14, 1988, an arbitrator concluded that Rite Aid violated the union recognition clause of the collective bargaining agreement by failing to apply it to the returns warehouse. The arbitrator's award required Rite Aid to apply the provisions of the collective bargaining agreement governing the Shiremanstown distribution center to the warehouse and to make certain payments and grant specified benefits to the warehouse employees. In addition, the arbitrator ordered that Rite Aid make the union whole for lost dues and initiation fees.

Rite Aid sought to circumvent the arbitration award by filing a unit clarification petition on August 18, 1988, with the National Labor Relations Board, with the object of obtaining a decision excluding the warehouse employees from the distribution center representation unit. Like the union, Rite Aid was successful in the procedure it initiated. The Board's regional director, on February 7, 1989, issued a decision and order excluding the warehouse employees from the distribution center unit on the ground that the facilities were basically different and the warehouse was not an "accretion" to the distribution unit. The regional director observed that this conclusion was consistent with the Board's reluctance to accrete unrepresented employees to existing units, which would effectively deny the employees an opportunity to express their preferences in a secret ballot election.

The proceedings separately instituted by Rite Aid and the Union moved in tandem, for the union filed a suit on January 5, 1989, in the district court under section 301 of the National Labor Relations Act, 29 U.S.C. §185, seeking to enforce the arbitration award. This time, however, the union was not successful, for on September 29, 1989, the district court dismissed the case and refused to enforce the award, as the court regarded the case as involving a representational rather than a contractual issue. The court accordingly held that in making his award the arbitrator had gone beyond his limited authority to interpret the collective bargaining agreement. The union

appealed, but we affirmed the order of the district court and the Supreme Court denied certiorari. *Teamsters Local Union No. 776 v. Rite Aid Corp.*, 902 F.2d 1562 (3d Cir.) (table), *cert. denied*, 111 S.Ct. 249 (1990).

The union did not accept the regional director's decision and order of February 7, 1989, excluding the warehouse employees from the distribution center unit. Instead, it filed a request for review which the board denied by order of April 28, 1989, concluding that the request raised "no substantial issues warranting review." The union nevertheless moved before the Board for reconsideration of the order of April 28, 1989, but this motion was denied as untimely. The union then sought leave to appeal from the Board so that it would consider the union's motion for reconsideration out of time, but the Board denied this motion as well.

What may be regarded as the third line of action in this controversy, and the one leading directly to the case before us, was initiated on May 15, 1989, when Rite Aid filed a charge with the Board against the Union. Rite Aid asserted that the union was engaged in unfair labor practices in violation of section 8(b)(1)(A), (2) and (3) of the NLRA, 29 U.S.C. §158(b)(1)(A), (2) and (3), by "continuing to seek enforcement of the [arbitration] award, despite the fact that the Board has already determined that the [warehouse] employees are excluded" from the bargaining unit. General Counsel of the Board issued a complaint against the union on June 20, 1989, reflecting the allegations Rite Aid made in its charge.

Subsequently, General Counsel made a motion for summary judgment which the Board granted in a decision and order of December 11, 1991. The Board first explained that there were no facts in dispute requiring resolution at a hearing. It then reviewed the facts with respect to the establishment of the returns warehouse and described the procedural history of the arbitration, district court and Board proceedings. After the Board set forth the contentions of the parties, it indicated "that the underlying question is representational rather than contractual." It then held "that the arbitrator's decision is not controlling because it was superseded by the superior authority of the Board's subsequent unit clarification Decision and Order." *See Carey v. Westinghouse Electric Corp.*, 375 U.S. 261,

84 S.Ct. 401 (1964). The Board then held that the union, in seeking enforcement of an arbitration award in direct conflict with the unit clarification determination, effectively "sought to apply the collective bargaining agreement to employees whom the Board has already determined to be outside of the parties' bargaining unit." This was a violation of section 8(b)(3) of the NLRA because the union was insisting on a change in the scope of the bargaining unit. The Board also held that the union's insistence that its entire contract applied to the warehouse employees, including the union security provisions, restrained and coerced employees in violation of section 8(b)(1)(A) of the NLRA. Further, the Board held that the union attempted to cause Rite Aid to discriminate against the warehouse employees in violation of section 8(a)(3). Thus, the union had engaged and was engaging in unfair labor practices in violation of section 8(b)(2) of the NLRA.

The Board next discussed *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 103 S.Ct. 2161 (1983). The Board indicated that in *Bill Johnson's* the Supreme Court held that it could be an unfair labor practice to file a lawsuit if the plaintiff in bringing it "had a retaliatory motive, *i.e.*, it was motivated by a desire to retaliate against the exercise of a Section 7 [29 U.S.C. §157] right; and (2) the lawsuit lacked a reasonable basis in fact or law." The Board indicated, however, that the Court said it was not addressing a case in which the lawsuit was preempted by the NLRA or had an objective that was illegal under federal law. A party bringing a preempted case or a case with an illegal objective would commit an unfair labor practice without regard for its motivation or for whether the suit was reasonably based in fact or law.

The Board said that it was clear from *Bill Johnson's* that the Court treated an "illegal objective" as something other than a retaliatory motive. The Board then held that an objective was illegal if it was incompatible with a Board ruling. In this case, notwithstanding the regional director's decision and order of February 7, 1989, that the warehouse employees were not part of the distribution center unit, and the Board's subsequent denial of the union's request for review, the union continued to press its lawsuit. Thus, the Board concluded that the lawsuit sought an illegal objective so that its prosecution was an unfair labor practice from and after

February 7, 1989, in violation of section 8(b)(1)(A), (2) and (3) of the NLRA. By way of remedy, the Board directed the union to cease and desist from maintaining its suit and required it to reimburse Rite Aid for the costs and counsel fees Rite Aid incurred after February 7, 1989, in defending against the union's action in the district court and on the appeals from the district court's order.

The matter is now before us because the union has filed a petition for review of the Board's decision and order and the Board has filed a cross-application for enforcement of its order. We have jurisdiction under 29 U.S.C. §160(e) and (f). We will deny the petition for review and will enforce the Board's order of December 11, 1991.

II.

ANALYSIS

We are principally concerned with two sources of law.[1] The first is the case law defining the authority of the Board in representational issues. It is, of course, well-established that the Board has primary jurisdiction over representational issues. *NLRB v. Paper Manufacturers Co.*, 786 F.2d 163, 166-67 (3d Cir. 1986); *Chas. S. Winner, Inc. v. Teamsters Local Union No. 115*, 777 F.2d 861, 863 (3d Cir. 1985). Accordingly, following an arbitrator's resolution of a representational issue, if "the Board disagrees with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence . . . ." *Carey v. Westinghouse Electric Corp.*, 375 U.S. at 272, 84 S.Ct. at 409. Thus, in *NLRB v. Paper Manufacturers*, we indicated that: "[o]ur holding that accretion, like successorship, is not a matter that can be

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1. While we must accept the Board's findings of fact "if supported by substantial evidence on the record as a whole." 29 U.S.C. § 160(e), inasmuch as there is no dispute regarding the historical record, that standard of review is easily applied here. While our review of questions of law is plenary, we nevertheless give deference to the Board's interpretation of the NLRA, *Tubari Ltd., Inc. v. NLRB*, 959 F.2d 451, 453 (3d Cir. 1992); *International Bhd. of Elec. Workers, Local 803 v. NLRB*, 826 F.2d 1283, 1287 (3d Cir. 1987). Even though that deferential standard might be inapplicable to constitutional questions raised by *Bill Johnson's*, we need not dwell on the point for we would reach our result on these issues even if we disregarded the Board's position.

resolved by contract arbitration is consistent with the position of the Board that it will not defer to arbitration on representation issues." 786 F.2d at 167. We again recently acknowledged the primacy of the Board in representational issues when we explained that, "[i]f an NLRB determination on the definition of the proper bargaining unit conflicts with an arbitration award, the NLRB decision will prevail." *Eichleay Corp. v. International Ass'n of Iron Workers*, 944 F.2d 1047, 1056 (3d Cir. 1991), *cert. dismissed*, 112 S.Ct 1285 (1992).

Thus, it should have been obvious to the union from and after February 7, 1989, when the regional director issued his decision and order excluding the warehouse employees from the distribution center unit, that the arbitration award was ineffective and that the union could not hope to have it enforced in its district court action. The only escape from this result oculd have been an administrative proceeding before the Board to review the regional director's decision and order or, perhaps, a judicial proceeding initiated by a petition for review of the action of the board. But the union was unsuccessful in its efforts to obtain administrative review of the regional director's decision and order, and it never filed a petition with this court for further review of the unit clarification determination. In the circumstances, then, unless some overarching principle of law is applicable, we will accept the Board's conclusion that the union was guilty of unfair labor practices under sections 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the NLRA, in prosecuting the district court action after February 7, 1989.

We realize that even though after February 7, 1989, the union should have recognized that it could not hope to have the arbitration award enforced, the finding that it committed unfair labor practices appears somewhat strained. To start with, it seems that Rite Aid never objected to the arbitration proceeding, at least in the sense of seeking an injunction against the arbitration. There is thus no reason to believe that the arbitration was initiated in bad faith and, of course, the Board did not hold it was. In addition, the Board did not hold that the mere filing of the district court action was an unfair labor practice. Furthermore, while it is true that the union, in prosecuting its district court action after the regional director's deci-

sion and order, sought to apply its collective bargaining agreement to employees already determined to be outside the distribution center unit, it could have only achieved this goal with court approval.

We also observe that it is difficult to understand how the mere prosecution of the district court action can be said to have coerced the employees, since they were not parties to the action and, indeed, might not even have been aware of it.[2] Furthermore, it could be argued that prosecution of the action to enforce the arbitration award could not have been an attempt to cause Rite Aid to discriminate against the warehouse employees, since the action could not have caused Rite Aid to do anything unless the union was successful in it, in which event the union would have been vindicated. Nevertheless, we think that since the Board's view can in a technical sense be justified and, in recognition of the fact that it has inferential support in judicial precedent, we should defer to it. *See International Longshoremen's Union v. NLRB*, 884 F.2d 1407, 1413-14 (D.C. Cir. 1989).

Our conclusion that, absent some overarching principle of law, we should uphold the Board's finding of unfair labor practices, takes us to the second significant source of law we consider in reaching our outcome, namely, the Supreme Court's opinion in *Bill Johnson's*, which holds that in some circumstances the First Amendment shields parties bringing lawsuits arising from labor disputes from unfair labor practices charges. As explained by the Supreme Court, *Bill Johnson's* was concerned with "whether the National Labor Relations Board may issue a cease-and-desist order to halt the prosecution of a state-court civil suit brought by an employer to retaliate against employees for exercising federally-protected labor rights, without also finding that the suit lacks a reasonable basis in fact or law." 461 U.S. at 733, 103 S.Ct. at 2165.

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2. The Supreme Court has indicated that "coerce" as used in section 8(b)(4)(ii) of the NLRA is a "nonspecific, indeed vague" word and thus should be interpreted cautiously without a "broad sweep." *DeBartolo Corp., v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 578, 108 S.Ct. 1392, 1399 (1988); *see also Limbach Co. v. Sheet Metal Workers International Ass'n*, 949 F.2d 1241, 1256 (3d Cir. 1991) (in banc). On a plenary basis, without giving deference to the Board, we might conclude that "coerce" was broadly applied here.

In *Bill Johnson's* after a discharged waitress filed an unfair labor practice charge, she and certain other persons picketed the employer's restaurant. The employer then filed an action in state court seeking an injunction against the picketing and damages for libel. Though the state court originally issued a temporary restraining order, within two months of the filing of the action, it dissolved the order and denied preliminary injunctive relief.

The discharged employee responded to the employer's state court suit by filing a second unfair labor practices charge, which included an allegation that the employer filed the civil suit against the defendants in retaliation for their protected, concerted activities and because of the initial unfair labor charges. A complaint was issued and, following a hearing, an administrative law judge held that the employer by prosecuting the suit committed an unfair labor practice. The judge's conclusion was based on a finding that the employer did not have a reasonable basis for the suit and thus filed it to penalize the discharged employee for having filed charges, and to penalize the other defendants for assisting her. With minor exceptions, the Board adopted the judge's findings of fact and conclusions of law and thus ordered the employer to take remedial measures. The court of appeals enforced the order of the Board.

The Supreme Court vacated and remanded. The Court indicated that at "first blush" the Board's position seemed to have substance because a "lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation," for "by suing an employee who filed charges with the Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit." *Id.* at 740, 103 S.Ct. at 2168.

But the Court recognized that there was an even more significant consideration: "the right of access to the courts [which] is an aspect of the First Amendment right to petition the Government for redress or grievances." *Id.* at 741, 103 S.Ct. 2161. Ultimately the Court concluded "that the Board's interpretation of the [NLRA was] untenable" and that the "filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it

would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the [NLRA]." *Id.*, at 743, 103 S.Ct. at 2170. However, the Court also concluded that it would reach a different result if the suit was based on an insubstantial claim, *i.e.*, one that did not have a reasonable basis. The Court indicated that a suit could not be viewed as not having a reasonable basis if there was a dispute over a genuine issue of material fact or, even if the facts were not disputed, there was a realistic chance that the plaintiff's legal theory might be adopted by the state court. In that event, the Board was obliged to allow the lawsuit to proceed. Ultimately, however, if the plaintiff did not prevail in the lawsuit, the Board might conclude that the suit had been filed in retaliation for the employees' exercise of section 7 rights and the Board could therefore assess after-the-fact relief of attorney's fees and other expenses against the plaintiff. The Court's reluctance to allow a prior restraint coupled with it recognition that later relief might be appropriate is a natural borrowing of principles regarding restrictions on freedom of speech.

The basic holding of *Bill Johnson's* was subject to a large exception, for the Court indicated that it was not dealing with a suit beyond a state court's jurisdiction because of federal preemption or "a suit that has an object that is illegal under federal law." *Id.* at 737 n.5, 103 S.Ct. 2161. The Board in this case understood the Court to mean that an "illegal objective" was something other than a retaliatory motive and we agree. Where there is an illegal objective, the Board may restrain the lawsuit if it is otherwise meritorious.

The difference between a lawsuit brought because of the plaintiff's retaliatory motivation and a lawsuit with an illegal object under federal law is subtle, for it may be possible for a retaliatory suit to have an illegal objective. For example, in *Bill Johnson's* the Court recognized that a lawsuit may be "a powerful instrument of coercion" as it can warn an employee "who files charges with the Board or engages in other protected activities" that he or she may be subject to a burdensome lawsuit. It would seem that such a retaliatory lawsuit would be brought to discourage employees from asserting their section 7 rights, an illegal objective.[3]

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3. *See also Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400 (3d Cir.) (in banc) (a retaliatory discharge of an otherwise unprotected supervisor may be

We believe that the distinction lies in the plaintiff's objective goals in bringing the action. Thus, in *Bill Johnson's* the plaintiff sought to prohibit the defendants from harassing its customers and blocking ingress and egress to the restaurant. Furthermore, the complaint included a libel count. On the surface, as the suit did not seek objectives which were illegal under federal law, it had legitimate goals and, depending upon the proofs at trial, could have been won by the plaintiff. *Bill Johnson's*, 461 U.S. at 741-42, 103 S.Ct. at 2169. Thus, in *Bill Johnson's*, the Court indicated that the suit could be restrained as an unfair labor practice only if the plaintiff had an improper motivation, a subjective criterion.

In this case the suit to enforce the arbitration award was prosecuted to circumvent the primary jurisdiction of the Board in deciding representational issues. Accordingly, regardless of the union's motivation, after February 7, 1989, the suit was being pursued for an illegal objective and the union, unlike the plaintiff in *Bill Johnson's* simply could not obtain the relief it sought regardless of the evidence it produced. In short the union, even if it satisfied the undemanding criteria for enforcement of an arbitration order, was, unlike the plaintiff in *Bill Johnson's*, pursuing an action it could not win. *See International Longshoremen's Union v. NLRB*, 884 F.2d at 1414. Therefore, in pursuing the district court action after the regional director issued his decision and order, the union was unreasonable and its conduct was not protected under *Bill Johnson's*.[4] The union's situation was thus much the same as that of a litigant which subjects itself to sanctions under Fed. R. Civ. P. 11 because of its objectively unreasonable position. Its subjective good faith will

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unlawful since the discharge may discourage other employees from asserting their section 7 rights under the NLRA), *cert. denied*, 111 S.Ct 509 (1990).

4. We also point out that while the Board's decision and order by its terms ordered the union to cease and desist from maintaining its action to enforce the arbitration award, in reality it had no such consequence, as the appellate proceedings following the district court action were completed before the Board issued its decision and order. Thus, inasmuch as the Board's decision and order could not be viewed as a prior restraint, even if the Board could not under *Bill Johnson's* grant cease-and-desist relief, which it could, it was not barred from reviewing the matter with hindsight and ordering after-the-fact relief.

not save it. *See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 111 S.Ct. 922, 932 (1991).

The union seeks to avoid enforcement of the decision and order by pointing out that under the Labor Management Relations Act, 29 U.S.C. §185(a), it had a duty of fair representation of its members. *See Air Line Pilots Ass'n v. O'Neill*, 111 S.Ct. 1127 (1991); *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967). The union contends that as the arbitration award would have benefited its members, it was obliged to seek its enforcement. Whatever force this argument might have in another context, it is frivolous here for, as we have indicated, the law is well-established that the arbitrator's award could not survive the Board's decision. The duty of fair representation does not require a union to pursue an action which is barred by clear law.

Eichleay Corp v. Iron Workers, 944 F.2d 1047, cited by the union, likewise does not justify its prosecution of the district court action. In *Eichleay* we enforced an award of an arbitrator on a contractual issue, but denied enforcement of an arbitration award which was contrary to a Board unit clarification ruling, *i.e.*, a representational issue. Indeed we took pains to draw the distinction between contractual and representational issues. Thus, *Eichleay* is consistent with the law we have already cited, that the regional director's decision and order were paramount here.[5]

III.

CONCLUSION

In view of the foregoing, we will deny the petition for review and will grant the cross-application for enforcement of the decision and order of December 11, 1989. [sic]

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5. The union also challenges the Board's remedial order, but its argument on this point is clearly without merit and requires no discussion, as the Board did not abuse its discretion in fashioning a remedy. *See Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400, 405 (3d Cir.), *cert. denied*, 111 S.Ct. 509 (1990).

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

SOR
305 NLRB No. 114 D—2414
Shiremanstown, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL 776 AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO[1]

and Case 5—CB—6292

RITE AID CORPORATION

DECISION AND ORDER

The General Counsel of the National Labor Relations Board issued a complaint on June 20, 1989, against Chauffeurs, Teamsters and Helpers Local 776, the Respondent, alleging that it has violated Section 8(b)(1)(A), (2), and (3) of the Act by continuing to seek judicial enforcement of an arbitration award that is in direct conflict with the Board's unit clarification determination in Case 5—UC—275 (not included in bound volumes). The Respondent filed its answer admitting the pertinent facts as set forth more fully below, but denying that its conduct has violated the Act.

On December 18, 1989, the General Counsel filed with the Board a Motion for Summary Judgment, with exhibits attached.[2] The General Counsel contends that, in light of the factual admissions

1. The name of the Respondent has been changed to reflect the new official name of the International Union

2. We grant the General Counsel's unopposed motions to receive additional evidence in the form of proposed Exh. 26, which is a copy of the judgment order of the United States Court of Appeals for the Third Circuit, in Case No. 89—5859, affirming the judgment of the United States District Court for the Middle District of Pennsylvania in Case No. 89—0015; proposed G.C. Exh. 27, which is a copy of the order of the United States Court of Appeals for the Third Circuit denying the Respondent's Sur Petition for Rehearing; and proposed G.C. Exh. 28, which is a copy of the Order of the United States Supreme Court denying the Respondent's petition for a writ of certiorari.

contained in the Respondent's answer, the pleadings raise no genuine issues of fact which require an evidentiary hearing. Therefore, on December 22, 1989, the Board issued an order transferring proceeding to the Board and Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. The Respondent filed a response, with brief attached. The Charging Party also filed a response, with brief attached. Finally, the General Counsel filed a supplemental memorandum in support of its Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motion for Summary Judgment

In light of the Respondent's admission of all factual allegations in the complaint, there is no material issue of fact that would require a hearing. Further, for the reasons set forth below, we find, on the basis of the undisputed record evidence, that the Respondent has violated the Act as alleged. Accordingly, we are granting the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. *Jurisdiction*

The Employer is a Pennsylvania corporation, with an office and place of business in Shiremanstown, Pennsylvania, where it operates a regional distribution facility serving retail stores operated by the Employer. During the past 12 months, a representative period, the Employer, in the course and conduct of its business operations purchased and received at its Shiremanstown, Pennsylvania facility products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Pennsylvania. We find, on the basis of the foregoing, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act that it will effectuate the policies of the Act to assert jurisdiction. We

further find that the Respondent is a labor organization within the meaning of section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The issue is whether the Respondent has violated Section 8(b)(1)(A), (2), and (3) of the Act by continuing to prosecute its Section 301 lawsuit in the face of a conflicting Board unit clarification determination.

A. *Facts*

Prior to August 1987, the Employer operated a Central Distribution Center (CDC) in Shiremanstown, Pennsylvania, and another five CDCs in other States which served as regional distribution/warehouse hubs for retail stores. The Employer's warehouse employees at its Shiremanstown facility have historically been represented by the Respondent since the mid-1960s. Such recognition has been embodied in successive collective bargaining agreements, the most recent of which is effective from July 26, 1987, through July 22, 1990. The agreement defines the bargaining unit as follows:

> The bargaining unit covered by this Agreement consists of all warehouse employees, carpenters, and truck drivers, including step-in van drivers, over-the-road drivers, employed by Rack-Rite Distributors Division, Rite Aid Corporation, at its Shiremanstown, Pennsylvania, operation; but excluding salesmen, office clerical employees, professional employees, guards and supervisors as defined in the Act, and all employees at the Employer's other warehouse locations.

The current agreement contains a provision for final and binding arbitration of grievances.

In August 1987, substantial retail expansion caused an increased volume of warehouse "returns work" of damaged or unsold goods. The Employer, therefore, instituted certain changes in its returns

processing and established a Central Returns Warehouse (CRW) in Shiremanstown as a nonunion facility. Thereafter, all "returns," after preliminary sorting and separation at the respective CDCs, were shipped to the Shiremanstown CRW, where the final two stages of the returns process would be performed. Twenty seven new employees were hired to work in this new facility. No employees were transferred from the existing CDC to CRW. Employees in the CDC who had been performing the now-removed returns work were transferred to other positions within the CDC.

The Respondent filed three grievances protesting the Employer's actions and seeking a finding that the returns work performed at the CRW be declared bargaining unit work covered by the collective bargaining agreement and that the Employer be directed to make whole all affected employees. On July 14, 1988, the arbitrator issued an award concluding that "the Company violated Article II of the Agreement [Union Recognition Clause] by its failure to have applied the terms of the Agreement to the performance of returns work . . . by its Central Returns Warehouse component."

Thereafter, on August 18, 1988, the Employer filed a unit clarification petition with the Board in Case 5–UC–275 seeking to exclude from the CDC unit those employees hired and employed in the CRW. While the Employer's petition was pending, the Respondent, on January 5, 1989, filed a Section 301 complaint in the United States District Court for the Middle District of Pennsylvania, seeking enforcement of the arbitrator's award. On February 7, 1989, the Board's Regional Director for Region 5 issued a Decision and Order in Case 5–UC–275, which clarified the Shiremanstown CDC unit to exclude the employees in the CRW. The Regional Director concluded that the CRW facility is basically a different operation from the CDC facility. He viewed the Employer's petition as raising "the same fundamental issue that was the subject of the Arbitration's decision" but refused "to defer to the Arbitrator's Decision and Award in regard to the representational status of the employees subject to the petition." The Respondent filed a request for review which was denied on April 28, 1989, by the Board. A further motion for reconsideration and a request for leave to file an appeal by the Respondent were also denied. The Respondent nevertheless continued to press its Section 301 suit in the district court.

On May 12, 1989, the Employer filed a charge leading to the instant complaint, which issued on June 20, 1989. On September 29, 1989, the district court granted the Employer's Motion for Summary Judgment dismissing the Respondent's Section 301 suit. On October 25, 1989, the Union filed an appeal with the United States Court of Appeals for the Third Circuit. On December 18, 1989, the General Counsel filed the instant Motion for Summary Judgment. While the motion was pending, the court of appeals affirmed the district court's decision. The Respondent subsequently petitioned for rehearing in the court of appeals and to the United States Supreme Court for a writ of certiorari. Both petitions were denied.

B. *Contention of the Parties*

The General Counsel, in support of his Motion for Summary Judgment, contends that the issue presented is representational rather than contractual[3] and that the Board has an express statutory mandate to determine questions of representation, accretion, and appropriate unit. Moreover, it is well settled that Board decisions override conflicting arbitral awards. *Carey v. Westinghouse*, 375 U.S. 261, 272 (1964). Further, according to the General Counsel, once an arbitral award has issued involving questions of representation, accretion, and appropriate unit, the Board applies the standards enunciated in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984), to determine if the decision merits deference. If the decision does not warrant deference, the Board will find a violation based on an attempt to enforce the arbitral award. *Port Chester Nursing Home*, 269 NLRB 150 (1984). The General Counsel further contends that deference to the arbitrator's award is totally unwarranted here, as the award is in direct conflict with the Board's unit clarification decision. According to the General Counsel, under *Carey v. Westinghouse*, supra, the Board's unit clarification decision takes precedence over the conflicting arbitral award, and the award is unenforceable through a Section 301 lawsuit. Therefore, the General Counsel maintains that the Union's attempt

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3. The Charging Party, Rite Aid, in response to the Board's Notice to Show Cause, submitted a letter noting its agreement with the General Counsel that this matter is representational rather than contractual.

to enforce that award in the face of the Board's unit clarification decision must be considered an unfair labor practice since the objective of the Respondent's lawsuit is illegal under Federal law. *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983).

The General Counsel further maintains that the Respondent violated Section 8(b)(3) of the Act by seeking to enforce an arbitration award which requires the Employer to apply the parties' collective bargaining agreement, including the union-security provision, to nonbargaining unit employees. *Retail Clerks Local 588 (Raley's)*, 224 NLRB 1638 (1976), enf. denied 565 F.2d 769 (D.C. Cir. 1977); *Electrical Workers IBEW Local 323 (Active Enterprises)*, 242 NLRB 305 (1979). Further, the General Counsel argues that in these circumstances, the Respondent's conduct must also be considered an attempt to cause the Employer to discriminate in violation of Section 8(a)(3) against the employees to whom the Respondent seeks to have the contract extended and applied. The General Counsel contends that the conduct thus violates Section 8(b)(1)(A) and (2) as well. Id.

In its answer to the General Counsel's motion, the Respondent admits the factual allegations of the complaint, but denies that summary judgment in favor of the General Counsel is appropriate. Specifically, it argues that the central issue is contractual rather than representational, and that because the Employer failed to move to vacate the arbitrator's award resolving the contractual dispute in the Respondent's favor, that award should be regarded as final and binding against the Employer. Because that award held that the CRW work was bargaining unit work, the Respondent therefore contends that the Board should hold the Employer estopped from invoking the Board's unit clarification procedure in an effort to circumvent the award by having the CRW employees declared to be outside the unit. The Respondent further denies that its efforts to enforce its view of the contract through the suit to enforce the award constitute an unfair labor practice. Finally, the Respondent argues that ruling on the General Counsel's motion is premature because, although the district court had refused to enforce the arbitration award, the

Respondent had appealed that adverse ruling to the court of appeals and could seek certiorari of any adverse ruling by the appellate court.[4]

C. *Discussion*

We agree with the General Counsel that the underlying question is representational rather than contractual. The Respondent's characterization of the dispute as contractual does not create a factual dispute.

After issuance of the unit clarification determination which found that the newly hired CRW employees were excluded from the CDC unit employees, the Respondent continued to maintain its Section 301 suit to enforce the arbitrator's conflicting award. Based on this conduct in derogation of the Regional Director's unit clarification determination, the General Counsel issued the instant complaint. We hold that the arbitrator's decision is not controlling because it was superseded by the superior authority of the Board's subsequent unit clarification Decision and Order. *Carey v. Westinghouse*, supra. By continuing to seek enforcement of an arbitration award which is in direct conflict with the Board's unit clarification determination, the Respondent has, in effect, sought to apply the collective bargaining agreement to employees whom the board has already determined to be outside of the parties' bargaining unit. In so doing, the Respondent has insisted and is insisting on bargaining for a change in the scope of the existing bargaining unit and, therefore, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(3) of the Act.[5]

Further, by insisting on application of its entire contract, in-

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4. As noted in fn. 2, above, the court of appeals has since affirmed the district court's ruling against the Respondent, and the Supreme Court has denied a petition for certiorari.

5. *Chicago Truck Drivers (Signal Delivery)*, 279 NLRB 904 (1986); *Retail Clerks Local 588 (Raley's)*, supra; *Electrical Workers IBEW Local 323 (Active Enterprises)*, supra; and *Smith Steel Workers (A.O. Smith Corp.) 420 F.2d 1 (7th Cir. 1969)*. *In Smith Steel Workers*, the court held that a union failed to bargain in good faith when it continued to insist that it represented certain workers and sought arbitration of the issue after a Board decision that the workers were part of a unit represented by another union. The court reasoned that following the Board's unit clarification order, the union had no right to employ grievance procedures to overturn it.

cluding the union-security provisions, to the Employer's CRW employees, the Respondent has restrained and coerced employees in violation of Section 8(b)(1)(A) of the Act. By that same conduct, it has attempted to cause the Employer to discriminate against the CRW employees in violation of Section 8(a)(3) of the Act and, therefore, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(2) of the Act.[6]

Although the legality of a lawsuit is in issue, the Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*, supra, does not require a contrary method of analysis. In that case, the Supreme Court held, with exceptions noted below, that, as a general rule, a lawsuit could be condemned as an unfair labor practice if two conditions were met: (1) the suit had a retaliatory motive, i.e., it was motivated by a desire to retaliate against the exercise of a Section 7 right; and (2) the lawsuit lacked a reasonable basis in fact or law.

The Court further noted, however, that it was not addressing a case in which (1) the lawsuit was preempted by the Act or (2) the lawsuit had an objective which is illegal under Federal law. In either of these situations, the legality of the lawsuit enjoys no special protection under *Bill Johnson's*.

The instant case involves the "illegal objective" exception. As an initial matter, we note that "illegal objective" does not mean the same thing as "retaliatory motive." As noted above, the holding of *Bill Johnson's* is that a lawsuit can be condemned as an unfair labor practice if it is filed with a retaliatory motive and if it has no reasonable basis. The "retaliatory motive" refers to actual motive of the respondent-plaintiff in filing the suit. If the actual motive of the lawsuit is to retaliate against or frustrate the exercise of a statutory right, that component of the general rule has been met. As a separate matter, the Court said in footnote 5 that it was not dealing with a suit that had an "illegal objective" (or that was preempted). Accordingly, it is clear that the Court intended the phrase "illegal objective" to mean something other than "retaliatory motive."

Having said what "illegal objective" does not mean, we now turn to what it does mean. In our view, where the Board has pre-

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6. *Retail Clerks Local 588 (Raley's)*, supra.

viously ruled on a given matter, and where the lawsuit is aimed at achieving a result that is incompatible with the Board's ruling, the lawsuit falls within the "illegal objective" exception to *Bill Johnson's*.[7] Accordingly, the lawsuit enjoys no special protection. If it is unlawful under traditional NLRA principles, it can be condemned as an unfair labor practice.

Applying these principles to the instant case, we note that the Regional Director, on February 7, 1989, ruled that the CRW employees were not included in the CDC unit. Despite this ruling, and the Board's subsequent denial of a request for review, the Respondent continued to press its lawsuit. That lawsuit was aimed at achieving a result that is incompatible with the Regional Director's ruling. Accordingly, the lawsuit was for an "illegal objective" within the meaning of footnote 5 of *Bill Johnson's*.[8] In view of this, and because the lawsuit violates Section 8(b)(1)(A), (2) and (3) under established NLRA principles, the lawsuit can be condemned as an unfair labor practice under these subsections from and after February 7, 1989.[9]

Conclusions of Law

1. By continuing to seek enforcement of an arbitration award which is incompatible with the Board's unit clarification decision in Case 5—UC—275, thus seeking to apply its collective bargaining agreement to employees whom the Board has already determined to be outside the bargaining unit, the Respondent has insisted and is insisting on bargaining for a change in the scope of the existing

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7. We do not necessarily imply that this is the only application of the phrase "illegal objective." Another situation, acknowledged by the Supreme Court in *Bill Johnson's*, is where a union, for example, has sought state court enforcement of fines that could not be lawfully imposed under the Act. 461 U.S. at 737 fn. 5.

8. In view of the conclusion that the lawsuit falls within the "illegal objective" exception to *Bill Johnson's*, we need not pass on whether the suit had a retaliatory motive and whether it had no reasonable basis in fact or law.

9. *Teamsters Local 952 (Pepsi-Cola Bottling)*, 305 NLRB No. 28 (Sept. 30, 1991). Because the unfair labor practice complaint attacks the lawsuit only from and after February 7, 1989, we need not decide whether it would be appropriate to find that filing and maintenance of the lawsuit prior to that point constituted an unfair labor practice.

bargaining unit and therefore has engaged in and is engaging in an unfair labor practice within the meaning of Section 8(b)(3) of the Act.

2. By insisting on application of its entire contract, including the union-security provision, to the Employer's CRW employees, the Respondent restrained and coerced employees in violation of Section 8(b)(1)(A) of the Act and has attempted to cause the Employer to discriminate against its employees and has thereby engaged in and is engaging in an unfair labor practice in violation of Section 8(b)(2) and (1)(A) of the Act.

The Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A), (2) and (3) of the Act, we shall order that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to reimburse the Employer for all reasonable expenses and legal fees, with interest, that the Employer incurred after February 7, 1989 — the date of issuance of the Board's unit clarification order — in defending against the Section 301 suit in the United States District Court for the Middle District of Pennsylvania, and any subsequent appeals Respondent has filed or may file.[10] Those expenses were incurred solely because

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10. Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In prior cases in which the Board has ordered reimbursement for litigation fees and other expenses, the parties apparently did not litigate, and thus the Board did not specifically address, the issue of interest on litigation expenses. See e.g., *Phoenix Newspapers*, 294 NLRB No. 3 (May 23, 1989) (former Member Cracraft dissenting on the merits) (litigation expenses awarded without interests); *Bill Johnson's Restaurants*, 290 NLRB 29, 32-33 (1986) (Chairman Stephens dissenting in part on the merits) (litigation expenses awarded without interest); and *Baptist Memorial Hospital*, 229 NLRB 45 (1977) (litigation expenses awarded without interest), but cf. *Inland Boatmen's Union (Dillingham Tug)*, 276 NLRB 1261 (1985) (interest awarded on litigation expenses). See *J. P. Stevens & Co.*, 244 NLRB 407, 408, 409 (1979) (interest awarded on litigation expenses in light of respondent's flagrant disregard of Board and court orders). In *Bill Johnson's*, 461 U.S. 731 (1983), the Supreme Court stated, at 747:

> If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses. *It may also order any other proper relief that would ef-*

the Respondent continued to maintain its suit after the Regional Director issued his unit clarification determination in Case 5—UC—275, an action that we have found violated the National Labor Relations Act. In order to vindicate our interest in enforcing the Act, we have the statutory authority pursuant to Section 10(c) to authorize such relief.

ORDER

The National Labor Relations Board orders that the Respondent, Chauffeurs, Teamsters and Helpers Local 776 affiliated with International Brotherhood of Teamsters, AFL-CIO, Harrisburg, Pennsylvania, its officers, agents, and representatives, shall

1. Cease and desist from

   (a) Maintaining its Section 301 lawsuit seeking enforcement of Arbitrator Ira Jaffe's Opinion and Award concerning grievance numbers 6204, 7590, and 9834.

   (b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

   (a) Withdraw or if necessary otherwise seek dismissal of any action in *Teamsters Local 776 v. Rite Aid Corp.*, C.A. No. CV—89—5859.

   (b) In the manner set forth in the remedy portion of the decision, reimburse the Employer, Rite Aid Corporation,

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fectuate the policies of the Act. 29 U.S.C. §160(c). [Emphasis added.] [Footnote omitted.]

Upon consideration, we hold that in make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses. The remedial order is designed to restore the status quo ante and to make whole the party who had to defend agaisnt an unlawful legal action. A party will normally incur those expenses at the time it is defending against an unlawful action. A subsequent make-whole award, like an award of backpay, must include interest because such an award is a form of indebtedness. See *Isis Plumbing Co.*, 138 NLRB 716, 719 (1962).

for all reasonable expenses and legal fees, with interest as computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), incurred in defense of the Section 301 lawsuit styled as *Teamsters Local 776 v. Rite Aid Corp.*, in Case No. 89—5859 in the United States Court of Appeals for the Third Circuit, in *Teamsters Local 776 v. Rite Aid Corp.*, in Case No. CV—89—0015 of the United States District Court for the Middle District of Pennsylvania, and any subsequent actions the Respondent has filed.

(c) Post at its offices and meeting halls copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by its authorized representative, shall be posted by the Respondent immediately upon receipt and maintained by it for 60 consecutive days in conspicious places including all places where notices to members are customarily posted. Reasonable steps shall be taken by it to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Forward signed copies of the notice to the Regional Director for Region 5 for posting by Rite Aid Corporation, if willing, at its facilities in Shiremanstown, Pennsylvania, where notices to employees are customarily posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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11. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. December 11, 1991

James M. Stephens, Chairman

Clifford R. Oviatt, Jr., Member

John N. Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT continue to maintain our Section 301 lawsuit against the Rite Aid Corporation seeking enforcement of an arbitration award which is in direct conflict with the Regional Director's unit clarification determination in Case 5—UC—275.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw or if necessary otherwise seek dismissal of the lawsuit we filed in *Teamsters Local 776 v. Rite Aid Corp.*, C.A. No. CV—89—0015.

WE WILL reimburse the Rite Aid Corporation for all reasonable fees and legal expenses, plus interest, incurred in defense of the Section 301 lawsuit styled as *Teamsters Local 776 v. Rite Aid Corp.*, C.A. No. 89—5859 in the United States Court of Appeals for the Third District Circuit and C.A. No. CV—89—0015, in the United States District Court for the Middle District of Pennsylvania, and any subsequent actions we have filed.

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL 776 AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

_____
(Labor Organization)

Dated_____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 109 Market Place, Fourth Floor, Baltimore, Maryland 21202-4026, Telephone 301-962-2772.

Supreme Court, U.S.
FILED
FEB 3 1993
OFFICE OF THE CLERK

No. 92-889

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHAUFFEURS, TEAMSTERS, AND HELPERS, LOCAL 776, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

JERRY M. HUNTER
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YVONNE T. DIXON
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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board correctly determined that petitioner, a labor organization, committed an unfair labor practice by continuing to prosecute a district court action seeking enforcement of an arbitral award, after an intervening decision of the Board made clear that the objective of petitioner's district court action was illegal.

2. Whether the Board abused its discretion by ordering petitioner to reimburse the employer for reasonable legal fees and expenses incurred in defending against petitioner's action.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Bill Johnson's Restaurants, Inc. v. *NLRB*, 461 U.S. 731 (1983) 7, 8, 10, 14

Carey v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964) 6, 8-9

Chicago Truck Drivers Union (Signal Delivery), 279 N.L.R.B. 904 (1986) 6

International Ladies' Garment Workers' Union v. *Quality Mfg. Co.*, 420 U.S. 276 (1975) 14

International Longshoremen's & Warehousemen's Union, Local 13, 290 N.L.R.B. 616 (1988), enforced, 884 F.2d 1407 (D.C. Cir. 1989) 13

Laney & Duke Storage Warehouse Co., 151 N.L.R.B. 248 (1965), enforced in part, 369 F.2d 859 (5th Cir. 1966) ... 12

Local Union No. 323, IBEW (Active Enterprises), 242 N.L.R.B. 305 (1979) 6

Mike O'Connor Chevrolet-Buick-GMC Co., 209 N.L.R.B. 701 (1974), enforcement denied, 512 F.2d 684 (8th Cir. 1975) 12

Retail Clerks Local 588 (Raley's), 224 N.L.R.B. 1638 (1976), enforcement denied, 565 F.2d 769 (D.C. Cir. 1977) 6, 12

Retail Clerks Local 588 v. *NLRB*, 565 F.2d 769 (D.C. Cir. 1977) 12

Smith Steel Workers v. *A.O. Smith Corp.*, 420 F.2d 1 (7th Cir. 1969) 6

Cases—Continued: Page

Teamsters Local 952 (Pepsi-Cola Bottling), 305 N.L.R.B. No. 28 (Sept. 30, 1991) 13
Teamsters Local Union No. 776 v. *Rite Aid Corp.*, 135 L.R.R.M. (BNA) 2061 (M.D. Pa. 1989), aff'd mem., 902 F.2d 1562 (3d Cir.), cert. denied, 111 S. Ct. 249 (1990) .. 5-6
United Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) 3
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) .. 13
Woelke & Romero Framing, Inc. v. *NLRB*, 456 U.S. 645 (1982) 14

Statutes and regulations:

Labor-Management Relations Act, 29 U.S.C. 141 *et seq.*:
§ 301, 29 U.S.C. 185 ..... *passim*
§ 301(a), 29 U.S.C. 185(a) 3
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 7, 29 U.S.C. 157 ..... 5, 7
§ 8(a)(3), 29 U.S.C. 158(a)(3) 5, 7
§ 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A) 4, 5, 6, 7
§ 8(b)(2), 29 U.S.C. 158(b)(2) 4, 5, 6, 7
§ 8(b)(3), 29 U.S.C. 158(b)(3) 4, 5, 6, 7
§ 9(c), 29 U.S.C. 159(c) 3
§ 10(c), 29 U.S.C. 160(c) 14
§ 10(e), 29 U.S.C. 160(e) 14
§ 10(j), 29 U.S.C. 160(j) 11
29 C.F.R.:
Section 102.67(b) 11
Section 102.67(c) 11
Section 102.67(c)(1)-(4) 11

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 973 F.2d 230. The decision and order of the National Labor Relations Board (Pet. App. A14-A28) is reported at 305 N.L.R.B. No. 114.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1992. The petition for a writ of certiorari was filed on November 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Rite Aid Corporation (Company) operated a Central Distribution Center (CDC) in Shiremanstown, Pennsylvania. Pet. App. A16. Before August 1987, the CDC handled the sorting, storing, and shipping of unsold goods and the processing of returned goods from the Company's retail stores in the CDC's region. *Id.* at A3. Historically, the CDC employees were represented by petitioner, Chauffeurs, Teamsters and Helpers Local 776. *Ibid.* The labor agreement between petitioner and the Company contained a provision recognizing petitioner as the exclusive bargaining representative for a unit consisting of "all warehouse employees * * * employed by [the Company] at its Shiremanstown, Pennsylvania, operation; but excluding * * * all employees at the [Company's] other warehouse locations." *Id.* at A16. The agreement also provided for final and binding arbitration of grievances. *Id.* at A3, A16.

In August 1987, as a result of increased business, the Company opened a Central Returns Warehouse (CRW) in Shiremanstown to process returned goods, a function previously performed by the CDC. Pet. App. A3. The Company hired 27 new employees, who were not represented by a union, to staff the CRW, and assigned CDC employees who previously had handled returned goods work to different duties within the CDC. *Id.* at A3-A4.

Petitioner protested the Company's decision to staff the CRW with non-union employees. It filed grievances claiming that, since the returned goods work performed at the CRW was bargaining unit work covered by the labor agreement in effect at the

CDC, the terms of that agreement (including the union recognition clause) applied to the new CRW employees. Pet. App. A4, A17. In July 1988, an arbitrator ruled in petitioner's favor, finding that "the Company violated [the union recognition clause of the collective-bargaining agreement] by its failure to have applied the terms of the Agreement to the performance of returns work * * * by its [CRW] component." *Id.* at A17. The arbitrator's award required the Company to apply the terms of the CDC agreement to the CRW workers, and to make them whole regarding lost wages and benefits. The award also directed the Company to make petitioner whole for lost dues and initiation fees respecting the CRW employees. *Id.* at A4.

2. In August 1988, the Company filed a unit-clarification petition with the National Labor Relations Board (Board) seeking a ruling excluding the new CRW employees from the CDC bargaining unit. Pet. App. A4; see 29 U.S.C. 159(c). While the Company's petition was pending before the Board, petitioner moved for judicial enforcement of the arbitration award by filing an action against the Company in federal district court under Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185.[1] On

[1] Section 301(a) provides, in relevant part: "Suits for violation of contracts between an employer and a labor organization * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. 185(a). Section 301 is a proper vehicle for obtaining judicial enforcement of an arbitration award. See, *e.g.*, *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

February 7, 1989, after a hearing, the Board's Regional Director issued a decision in the unit-clarification proceeding, excluding the CRW employees from the CDC bargaining unit because the evidence showed that the two facilities were essentially different operations and that the CRW was not an accretion to the CDC. Pet. App. A4.[2] The Regional Director recognized that the unit-clarification proceeding raised "the same fundamental issue that was the subject of the [arbitrator's] decision," but he declined to defer to the arbitral award because the core dispute went to "the representational status of the employees subject to the [unit-clarification] petition." *Id.* at A17. Petitioner thereafter sought review by the Board of the Regional Director's decision, but the Board denied the request as it raised no substantial issue. *Id.* at A5.

Despite the Regional Director's decision excluding the new CRW employees from the CDC bargaining unit, petitioner continued to press for judicial enforcement of the arbitrator's award. Pet. App. A17. In response, the Company filed an unfair labor practice charge against petitioner, alleging that petitioner's continued prosecution of its Section 301 action, in the face of the contrary unit-clarification decision, violated Sections 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the National Labor Relations Act (Act), 29 U.S.C. 158

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[2] The Regional Director noted the Board's reluctance to add unrepresented employees to existing bargaining units, since accretion would in effect deny them an opportunity to express their preference respecting representation in a secret-ballot election. Pet. App. A4.

(b)(1)(A), 158(b)(2), 158(b)(3).[3] Pet. App. A5. In June 1989, the Board's General Counsel issued a complaint against petitioner and subsequently moved for summary judgment. *Id.* at A14.

Meanwhile, in September 1989, the district court issued a decision denying enforcement of the arbitrator's award and dismissing petitioner's Section 301 suit. The district court held that, since the question whether the new CRW employees fell within the CDC bargaining unit was representational rather than contractual, the arbitrator had exceeded his authority to interpret the collective bargaining agreement in fashioning his award. Pet. App. A4-A5. The Third Circuit affirmed the district court, and this Court denied review. *Teamsters Local Union No. 776* v. *Rite Aid Corp.*, 135 L.R.R.M. (BNA) 2061

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[3] Section 8(b)(1)(A) makes it an unfair labor practice for a union to "restrain or coerce" employees in the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157. Section 7 provides, in relevant part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities." Section 8(b)(2) makes it an unfair labor practice for a union to "cause or attempt to cause" an employer to violate Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3). Section 8(a)(3) prohibits an employer from engaging in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(b)(3) makes it an unfair labor practice for a union to "refuse to bargain collectively" with the employer.

(M.D. Pa. 1989), aff'd mem., 902 F.2d 1562 (3d Cir.), cert. denied, 111 S. Ct. 249 (1990).

3. In December 1991, the Board granted the General Counsel's motion for summary judgment. First, the Board agreed that the underlying dispute between petitioner and the Company was representational rather than contractual, and that the Regional Director, in his unit-clarification determination, had therefore acted properly in refusing to defer to the arbitral award. The Board noted that under *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964), the arbitrator's decision was "superseded by the superior authority of the Board's subsequent unit clarification [order]."[4] Pet. App. A20.

Next, the Board found that petitioner violated Sections (8)(b)(1)(A), 8(b)(2), and 8(b)(3) of the Act by continuing to prosecute its Section 301 suit from and after February 7, 1989, the date on which the Regional Director issued his decision superseding that of the arbitrator.[5] Pet. App. A20-A23. The Board

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[4] In *Carey*, the Court held that, although representational issues, such as whether "the employees involved in the controversy are members of one bargaining unit or another," may be submitted to arbitration, "[t]he superior authority of the Board may be invoked at any time," and, should the Board disagree with the arbitrator, "the Board's ruling would, of course, take precedence." 375 U.S. at 272.

[5] The Board relied on *Chicago Truck Drivers Union (Signal Delivery)*, 279 N.L.R.B. 904 (1986); *Local Union No. 323, IBEW (Active Enterprises)*, 242 N.L.R.B. 305 (1979); *Retail Clerks Local 588 (Raley's)*, 224 N.L.R.B. 1638 (1976), enforcement denied, 565 F.2d 769 (D.C. Cir. 1977); and *Smith Steel Workers* v. *A. O. Smith Corp.*, 420 F.2d 1 (7th Cir. 1969). Pet. App. A20 n.5.

determined that petitioner's continued effort to obtain judicial enforcement of the arbitrator's award was a violation of Section 8(b)(3), because petitioner, in effect, was unlawfully insisting on bargaining for a change in the scope of the existing bargaining unit. Pet. App. A20. The Board also determined that petitioner violated Section 8(b)(1)(A), because, by insisting on application of the CDC labor agreement (including union-security provisions) to the CRW employees, petitioner unlawfully restrained and coerced the CRW employees respecting their right under Section 7 of the Act to representation by a union of their own choosing. Pet. App. A20-A21. And, since petitioner's continued insistence on application of the CDC agreement's union-security provisions was an attempt by petitioner to cause the Company to violate Section 8(a)(3)'s prohibition against "encourag[ing] * * * membership in any labor organization" that does not represent the CRW employees, the Board concluded that petitioner's conduct also ran afoul of Section 8(b)(2). Pet. App. A21.

Finally, the Board rejected petitioner's contention that *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), precluded the Board from condemning as an unfair labor practice petitioner's continued prosecution of its Section 301 suit. The Board noted that under *Bill Johnson's*, 461 U.S. at 749, it can enjoin as an unfair labor practice a lawsuit that was "filed with a retaliatory motive" only if the lawsuit has "no reasonable basis." Pet. App. A21. In this case, however, the Board ruled that it was unnecessary to determine whether petitioner's suit had a

retaliatory motive or lacked a reasonable basis, because petitioner's suit had an "illegal objective" and was therefore outside the protection of the *Bill Johnson's* rule.[6] *Id.* at A22 & n.8. The Board found that petitioner's Section 301 suit had an illegal objective, from and after the date of the Regional Director's decision in the unit-clarification proceeding (February 7, 1989), because it was "aimed at achieving a result that is incompatible with the Board's ruling" on the scope of the bargaining unit. Pet. App. A22. Accordingly, the Board ordered petitioner to cease and desist from maintaining its Section 301 action, and to reimburse the Company for reasonable legal fees and expenses incurred in defending against it after February 7, 1989.[7] Pet. App. A24-A25.

4. The court of appeals enforced the Board's order. Citing this Court's decision in *Carey* v. *Westing-*

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[6] In *Bill Johnson's*, the Court stated that its rule regarding Board cease and desist orders against lawsuits applied when the lawsuit was one that "federal law would not bar except for its allegedly retaliatory motivation." 461 U.S. at 737 n.5. The Court emphasized that it was "not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, *or a suit that has an objective that is illegal under federal law.*" *Ibid.* (emphasis added). As to the latter species of suit, the Court noted that its prior cases established that the Board may enjoin court actions seeking illegal objectives, such as the "enforcement of fines that could not lawfully be imposed under the Act." *Ibid.*

[7] As the Board noted, the district court judgment against petitioner had been affirmed by the Third Circuit, and rehearing and certiorari petitions had been denied. Pet. App. A14 n.2, A18. Thus, petitioner's lawsuit was completed before the Board entered its cease and desist order.

house Electric Corp., supra, as well as its own precedents, the court of appeals affirmed the primacy of Board rulings respecting representational issues, and, accordingly, found that "it should have been obvious to [petitioner] from and after February 7, 1989 * * * that the arbitration award was ineffective and that [petitioner] could not hope to have it enforced in its [Section 301] action." Pet. App. A7-A8. Although the court believed that, on the facts presented, the Board's finding that petitioner committed unfair labor pract-ices by continuing to prosecute its suit "appears somewhat strained," *id.* at A8, the court upheld the Board's finding as justified "in a technical sense," inferentially supported by precedent, and, therefore, deserving of judicial deference. *Id.* at A9.

The court of appeals also agreed with the Board that petitioner's Section 301 action fell within the "illegal objective" exception to *Bill Johnson's*. Pet. App. A12. The court stated that petitioner had prosecuted its Section 301 action "to circumvent the primary jurisdiction of the Board in deciding representational issues," and, therefore, the objective of the lawsuit was illegal. Pet. App. A12. The court explained that, in light of the Board's ruling in the unit-clarification proceeding, petitioner "simply could not obtain the relief it sought" on its Section 301 claim, "regardless of the evidence it produced." Pet. App. A12.[8]

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[8] The court of appeals also noted that, although the Board's order was framed as a cease and desist order, "in reality it had no such consequence," as the appellate proceedings involving the district court action had concluded before the Board acted. Pet. App. A12 n.4.

Finally, the court of appeals affirmed the Board's remedial order, including its requirement that petitioner reimburse the Company for legal fees and expenses incurred in defending against the Section 301 action. Pet. App. A13 n.5. The court held that the Board acted within its discretion in fashioning its order, and that petitioner's challenge to it was "clearly without merit." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 5-7) that the court of appeals erred in finding that its lawsuit had "an objective that is illegal under federal law" and that it was therefore unprotected against a Board order under *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 737 n.5 (1983). That contention lacks merit and does not warrant this Court's review.

Petitioner does not dispute that, under *Bill Johnson's*, the Board may enjoin as an unfair labor practice a suit that has an illegal objective under federal law and that, in light of the Board's final determination on unit clarification, petitioner's continued prosecution of its arbitration enforcement action sought an illegal objective. Petitioner contends (Pet. 6), however, that it "could not have possibly" had such an illegal objective as of the date of the Regional Director's February 7, 1989, decision and order on unit clarification, because review proceedings before the Board were not final for another four months.[9]

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[9] After the Regional Director's decision, petitioner filed a request for review, which the Board denied as raising no substantial issue. Petitioner next filed a motion for reconsider-

The Regional Director's decision, however, was binding on petitioner. The Board's rules provide that, in a unit-clarification proceeding, "[t]he decision of the regional director shall be final." 29 C.F.R. 102.67(b). Although a party can request review by the Board, "[t]he filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of * * * any action taken or directed by the regional director." *Ibid.* Moreover, the Board will exercise its discretion to review a unit-clarification determination "only where compelling reasons exist therefor." 29 C.F.R. 102.67(c).[10]

Petitioner's determination to flout the Regional Director's decision, while seeking to invoke the Board's discretionary power to review that decision, is not a basis for immunizing it from liability for an unfair labor practice in this case. Nor is there any substance to petitioner's claim (Pet. 6) that the Board's decision not to seek an interim injunction under Section 10(j) of the Act, 29 U.S.C. 160(j), to halt

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ation, which the Board denied as untimely filed. Petitioner then sought leave to file its motion for reconsideration out of time, but the Board denied that request as well. Pet. App. A5.

[10] The limited nature of Board review is underscored by the provision that review "may be granted only" where (1) a substantial legal or policy issue is raised that is not governed by, or conflicts with, a Board precedent; (2) there was a clear error in the resolution of a substantial fact question, causing prejudice to a party; (3) there was a prejudicial ruling made during the hearing; or (4) "there are compelling reasons for reconsideration of an important Board rule or policy." 29 C.F.R. 102.67(c)(1)-(4). Under that provision, Board review of a unit-clarification determination is the exception rather than the rule.

the Section 301 suit somehow freed it to ignore the Regional Director's order. "[I]n virtually every case of alleged unfair labor practices, the [r]espondent acts at its peril." *Retail Clerks Local 588 (Raley's)*, 224 N.L.R.B. 1638, 1640 (1976), enforcement denied, 565 F.2d 769 (D.C. Cir. 1977).[11] That principle applies when a Regional Director has ruled, and review is then sought before the Board.[12] Petitioner, therefore, was properly held liable for unfair labor practices from the date that the Regional Director issued his order clarifying the scope of the unit.

There is no merit to petitioner's suggestion (Pet. 6) that it could not have been pursuing an illegal objective by litigating its Section 301 suit until December 11, 1991, because not until that date did the Board require petitioner to cease and desist from further prosecuting that suit. It is not the Board's cease and desist order that made petitioner's action unlawful; the relevant Board decision is the one that

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[11] In *Retail Clerks Local 588* v. *NLRB*, 565 F.2d 769 (D.C. Cir. 1977), the court of appeals denied enforcement of a Board order where the union had invoked arbitration in reliance on changed circumstances since the Board's unit-clarification decision. The court emphasized, however, that it would have been a far different case if the union had invoked "judicial process to enforce an arbitration award that conflicted with, or was mooted by, the Board's subsequent negative resolution of the accretion question." *Id.* at 776. That latter course of conduct describes petitioner's action here.

[12] See *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 N.L.R.B. 701, 703 (1974), enforcement denied on other grounds, 512 F.2d 684 (8th Cir. 1975); *Laney & Duke Storage Warehouse Co.*, 151 N.L.R.B. 248, 266-267 (1965), enforced in relevant part, 369 F.2d 859, 869 (5th Cir. 1966).

petitioner sought to evade through the prosecution of its suit. See *Teamsters Local 952 (Pepsi-Cola Bottling)*, 305 N.L.R.B. No. 28 (Sept. 30, 1991); *International Longshoremen's & Warehousemen's Union, Local 13*, 290 N.L.R.B. 616 (1988), enforced, 884 F.2d 1407, 1413-1414 (D.C. Cir. 1989). In this case, that decision was the Regional Director's February 7, 1989, determination on unit clarification. Petitioner's goal in continuing to prosecute its Section 301 suit was to circumvent that ruling. Accordingly, petitioner's litigation objective in the Section 301 action was illegal beginning on that date.

Petitioner's reliance (Pet. 7) on the court of appeals' statement that the Board's finding of unfair labor practices "appears somewhat strained," Pet. App. A8, is misplaced. The court of appeals' comment was not addressed to the *Bill Johnson's* issue, but only to the question whether, on the facts in this case, the continued prosecution of the Section 301 suit could be deemed to coerce, or discriminate against, the employees involved. Not only did the court ultimately defer to the Board's resolution of that issue, but the issue raises at most a fact-bound evidentiary matter that does not warrant further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. Petitioner also contends (Pet. 7-8) that the Board abused its discretion by ordering it to reimburse the Company for legal fees and expenses incurred in defending against petitioner's Section 301 action after February 7, 1989. That claim does not merit review.

First, petitioner is jurisdictionally barred from asserting that claim. Although petitioner raised it in the court of appeals, petitioner never raised it before the Board. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner has shown no "extraordinary circumstances" excusing its failure to make this argument to the Board. Petitioner could have raised it either in its response to the General Counsel's motion for summary judgment, or in a motion for reconsideration once the Board issued its order. Since petitioner did neither, the courts lack jurisdiction to consider petitioner's claim. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

In any event, petitioner's contention is incorrect. When the Board finds that a party has committed an unfair labor practice by filing a lawsuit, the Board may, pursuant to Section 10(c) of the Act, 29 U.S.C. 160(c), compel that party to reimburse those wrongfully sued for their reasonable attorney's fees and expenses incurred in defending against the unlawful suit. *Bill Johnson's*, 461 U.S. at 747 ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses."). Here, the Board acted consistently with *Bill Johnson's* in awarding the Company reasonable legal

fees and expenses because petitioner had wrongfully sued it in federal court.

The authorities cited by petitioner (Pet. 8) address a separate issue: whether the Board should award litigation costs incurred in the unfair labor practice proceeding itself. Those authorities indicate that, if the Board had found that petitioner's basis for resisting the General Counsel's motion for summary judgment was frivolous, the Board could have awarded fees to the Company. As no such finding was made in this case, the Board did not shift those costs to petitioner. Petitioner's authorities, however, are irrelevant on the question whether the Board may award litigation expenses because of a wrongful suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

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